DOCUMENT RESUME

ED 084 579 CS 500 462

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TITLE An Examination of Undefined Forms of Proof in Academic Debate.
PUB DATE Nov 73
NOTE 12p.; Paper presented at the Annual Meeting of the Speech Communication Assn. (59th, New York City, November 8-11, 1973)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Communication (Thought Transfer); Critical Thinking; *Debate; Deductive Methods; Evaluative Thinking; Inductive Methods; *Logic; *Persuasive Discourse; *Public Speaking
IDENTIFIERS *Argumentation

ABSTRACT

Although texts on debate and argumentation deal with accepted forms of evidence, reasoning, and logical methods of proof, they do not cover adequately the "undefined" forms of proof. Criteria of evidence found in forensic literature are not always followed strictly by judges, in courtroom or classroom. Many debate judges allow imprecise, vague, or inaccurate reasoning ("non-evidential" proof) the same credibility as more reliable evidence. A more pragmatic definition of evidence should be that it covers anything that influences the outcome of a debate or a trial, including such factors as a speaker's appearance, his manner of presentation, and his persuasive tactics other than use of facts, testimony, or documentation. The outcome can depend also on the attitudes of the judge or jury and their interpretation of the material presented. A knowledge of undefined forms of proof, or non-evidential evidence, will help debaters evaluate their powers of persuasion more realistically. (RN)

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AN EXAMINATION OF UNDEFINED FORMS OF PROOF IN ACADEMIC DEBATE

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The area explored in this paper is an examination of the types of proof which usually are omitted from standard debate textbooks and literature. The hypotheses of this paper are: (1) that although almost every debate text devotes a chapter to the study of evidence and another to the study of reasoning, decisions frequently are not made solely on the basis of such proofs;[1] (2) that undefined forms of proof, while recognized as critical to some decisions (e.g., in law and "realistic" debating), are covered inadequately in academic debate texts;[2] (3) a knowledge and use of such methods of proof will help debaters more realistically evaluate their own powers of persuasion.[3]

A standard definition of evidence in academic debate is offered by Ewbank and Auer as "the body of facts and opinions bearing on the problem under consideration. Reasoning is the process of drawing conclusions from evidence."[4] McBurney, O'Neill and Mills add that it "consists of facts, opinion or material things, that are used in generating proof. It is the raw material from which the finished product, proof, is manufactured by the process of reasoning."[5] From an examination of forensic literature, it seems agreed that evidence has at least two qualities which experts recognize: (1) evidence is used as something to generate proof, functioning as a basic premise in an argument,[6] and (2) evidence is something which is external to and independent of the speaker who uses it.[7] In evaluating the quality of evidence,

Presented at the Speech Communication Association/American Forensic Association Convention, New York City, November 10, 1973.

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three standards are generally accepted: (1) evidence should be carefully documented;[8] (2) evidence should come from reputable sources (or, as lawyers would say, must be relevant, material and competent);[9] and (3) evidence should be the most recent available.[10] As indicated through this paper, these criteria are not always followed in actual practice. Additionally, the second quality is suspect--it seems obvious that evidence, the "non-evidential" proofs, are not always independent of the speaker who uses them.

Dresser suggests that to consider supporting materials as either evidential (evidence) or non-evidential (non-evidence) is an oversimplification. Rather, it might be best:

> to consider supporting material as ranged on a continuum, with material outside the control of the speaker at one end and that clearly controlled by him at the other. Such a view in turn would suggest that the most satisfactory way to determine the degree to which debaters used their evidential material in supporting their arguments would be to begin by considering the characteristics of the premises presented.[11]

This is an attitude which this author endorses.

Several debate authors have attempted to evaluate the relative merits of specific pieces of evidence by establishing categories of opposites, indicating which of each pair of opposites is superior and why. But these presumably all-inclusive categories omit "non-evidential" proofs, which this paper attempts to describe. For example: (1) One classification is between primary or original as opposed to secondary or hearsay evidence. Original evidence consists of reports based on first-hand observations and experiences, while hearsay is reported by someone else.[12] But all debate evidence is "reported by someone else"--unless the debater himself is an expert. Mills suggests a modified useage which would find favor with lawyers--that the debater should use the "best evidence available."[13] (2) Factual vs. opinion. We tend

to consider these two categories together too often, in noting that "this debater has just cited evidence." Probably it would be more equitable to recognize instances where one team relies primarily upon actual evidence while the other team relies primarily upon opinion. This would seem to be an obvious consideration; sometimes it is not. (3) Is the source expert or lay? Often the source will be qualified as an expert by the debater--but not in the area to which the cited opinion evidence pertains. (4) Direct vs. circumstantial. The fallability of observers in the former, and of faulty reasoning in the latter, should be recognized. (5) Preappointed vs. casual. Preappointed material is created and kept for future use; casual evidence is offered by the source without anticipating a future use. As Mills suggests, the latter is usually superior because there is less suspicion of bias or self-serving interest on the part of the expert.[14] The courts would agree with this application. (6) Personal vs. real. All testimony and statements are "personal" in this sense. Real evidence includes tangible objects which one can perceive through the senses--such as photographs and objects. Most instances of real or tangible evidence which debaters offer should be subjected to the same tests as for personal evidence, as charts and diagrams which debaters prepare depend upon the debater's ability to interpret the facts. (7) Written vs. unwritten. Written evidence is given greater credence in debate because it is easier to verify.[15] This type of material includes oral testimony of experts which has been "reduced" to writing. In theory, "unwritten" evidence is inadmissible in academic debating. But often debaters use their own or their colleague's statements as proof in itself.

The bulk of evidence used by debaters would fall into more than one of the above categories. Probably most pieces of evidence could be described as secondary (hearsay), opinion, expert, circumstantial, casual, personal and written. These categories are valuable in analyzing the suitability of evidence for supporting arguments; but other, "non-evidential" categories also should be considered. These "non-evidential" pieces of evidence may be the bases for the judge's decision.

In identifying "other" categories of evidence, those not discussed in forensic literature, it is helpful to turn to the legal sphere. Fotheringham notes that three major similarities exits between courtroom and classroom: (1) both face similar problems and obstacles in the promotion of critical thinking; (2) courts have a wealth of experience, literature, and method which merits study by the educator; similarly, lawyers are slowly discovering that speech personnel have some discoveries valuable to lawyers; and (3) educators need to advance in the development of methods as means of educating students for critical thinking.[16] Several attempts have been made within the legal profession to observe persuasive tactics not covered within the classical definitions of "evidence" and/or "reasoning." Indeed, the basis for the "best evidence rule" in law presumes that more may be gained from the way an expert says things than from the context of what he actually says. Lawyers use many clichés, one of which is that "evidence includes anything that occurs in the courtroom." Similarly, in academic debate, "evidence" becomes anything which occurs during the debate or in a context which influences the debate. For example--a debater who chats amiably with a judge at a party the night before an early-morning round may have established either intentionally or unintentionally the "non-evidential proof"

necessary to achieve credibility with that judge--or the reverse. A male debater's long hair may become an evidential factor to a judge who dislikes long hair; short skirts or statements bordering on the "lunatic fringe" may, with some judges under some circumstances, affect the decision. In such cases these factors have become evidence, although few debate texts consider them as such. Anyone experienced with collegiate debating can readily recall similar "non-evidential" forms of proof.

Legal definitions, partly due to necessity, are more all-encompassing (more specific and more precise) than debate definitions. Generally legal decisions rely upon descriptions of evidence from Corpus Juris Secundum, standard authority for legal terminology, which states that:

> Evidence, broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. . . . Evidence is the demonstration of a fact; . . . it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other . . . In legal acceptation, the term "evidence" includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[17]

Richard Rieke notes that lawyers have long accepted oral presentations as superior to written testimony in determining truth:

> The dress, the hesitancy, or assurance of answer, the facial expression, the proper emotional attitude toward a cross-examining attorney . . . [may be areas for] the attorney to practice his witnesses so that their verbal messages and non-verbal messages of vocal tone and visual cues will be consistent . . . The legal system recognizes this and calls for the jury to draw conclusions as to the credibility of a witness on the basis of all three codes. . . . The judicial system elaborately controls the verbal content of testimony, but places no barriers to the admission of messages through tonal and visual codes.[18]

Wigmore, a giant in the areas of judicial proof and evidence, notes three forensic methods of determining the credibility of a witness. From behavior of the witness while speaking to the court, judges and juries might detect: (1) a mental derangement, from his

incoherent utterances; (2) a deafness, from his failure to hear questions--an honest or dishonest disposition from his evasive or straightforward mode of expression; or (3) a bias, from his intonations or his facial movements.[19]

A vast body of knowledge about the use and value of evidence in law resulted from The American Jury, an encyclopedic study by Kaplan, Zeisel et. al. One major conclusion of this study is that judge and jury frequently disagree upon suitable punishment and often upon guilt itself. While most differences result from what debaters describe as within the realm of "reasoning," there are also differences between judge and jury as to the credibility of evidence--especially juries' attention to "non-evidential" or "extra-judicial" proofs.[20] The significance of undefined forms of proof in law was further explored in an experimental study by Bevan and Albert, who used a trained experimenter as a jury foreman and actors and law students as participants, with a lay "jury" to "try" cases. Results of this study led the experimenters to conclude that "how the plaintiff fares depends not only upon the merits of his case, but upon the jury that hears it, and upon the personality and behavior of the jury foreman."[21]

The need for further refining current applications of evidence and seeking more realistic and utilitarian means of using proof is emphasized by Gregg:

> The academic judge is obligated to decide which team presents the soundest arguments and, to render the decision, he must evaluate the evidence upon which reasoning is based. It is possible to suppose that in some cases where swift repetition and formulary presentation dins against the judge's ears the acuity of his critical faculties becomes dulled until he no longer listens to evidence to see that it proves the debater's assertions, but merely rushes the evidence through the standards for objectivity and deposits it in the appropriate mental basket. Should this be the case, the criteria for credibility would be "proving" the evidence in a most haphazard fashion.[22]

Gregg's discovery is not unique. Most debaters and coaches probably agree that judges frequently allow sloppy, imprecise, vague and even inaccurate "evidence" to be presented--and accord it the same degree of credibility as reliable evidence. Fotheringham emphasizes a common practice which further dilutes the quality of debate evidence:

> One commonly hears a debater introducing his notes with, "Authorities point out . . ." This is done whether the authorities are reporting facts or offering opinions. It would be helpful to adopt the attitude of the courts and teach the debater to clarify the sense in which he is offering notes. Do they represent a substitute reporting facts? Are they offered as expert opinion? Further, rather than use the term "authority" to cover both uses of sources, it would be helpful to adopt some of the vocabulary of the courts and speak of, "The facts as testified to by . . .", and "It is the expert opinion of . . ."[23]

Howell notes that judges are generally incapable of assigning more than superficial relationships between pieces of evidence without the debater's assistance:

> How is superiority established? Again, ritual. Recency of publications, accusations of possible bias. Prestige of source, popular acceptance. None of these may bear upon the possible representative nature and accuracy of the figures cited.[24]

Ehninger and Brockriede suggest that one partial solution to this problem is to require more careful documentation for major ideas:

> The chief way in which we approach certainty as a limit is by the discovery of converging lines of evidence. Any single piece of evidence must be respected, but the chance of avoiding error is vastly increased if there is support from independent sources. The difference between one line of evidence and two or three, pointing in the same direction, is tremendous.[25]

Coaches and judges encourage the verification of major ideas by more than one source of evidence, but where emphasis is upon covering the maximum "amount of ground" in each speech, often the justification for conclusions becomes "thinner" than desired.

Based upon the analysis of evidence used in ten championship debates, Dresser concluded that:

1. The definition of evidence offered in recent argumentation texts is too vague to make possible the classification of all supporting material used by debaters as either evidential or nonevidential.
2. Certain criteria for the use of evidence which are generally agreed upon by recent argumentation texts tend to be difficult for the listener to apply.
3. The skilled debaters studied in this investigation were not successful in using a variety of types of evidence: most of the evidence in the debates analyzed consisted of "evidence of opinion."
4. The debaters were comparatively conscientious about indicating the qualifications of their sources, but much less conscientious about showing the recency of their evidence.[26]

Dresser's second conclusion supports this author's observation that lawyers' consideration of the realm of evidence is more realistic, and supports Gregg's inference of the judge's acuity. Dresser's third and fourth observations raise an interesting question: as debate coaches, and as debaters, should we seek statements which are highly "quotable," which "sound good" to judges, or should we look for what the leading authorities are currently thinking? Debaters are probably often guilty of doing the former, encouraged by coaches and judges who recognize how "good" this evidence seems.

Dresser also noted that eight types of material were used as premises in these same debates. Note the dissimilarities between this list and that which may be found in almost any textbook chapter on evidence:

1. Court holdings or provisions of a law.
2. Specific "factual" statements: presumably descriptive statements pertaining to one incident.
3. "Factual" generalizations: p esumably descriptive statements pertaining to more than one incident.
4. Inferences. "opinions" not limited to the expression of a value judgment.
5. Value statements: an explicit statement of what a debater and his colleague consider desirable or important, or an assertion that one thing is more desirable or more important than another.

6. Definitions: an indication of what is meant by a term or concept.
7. Provision of the affirmative plan" references to the "plank" of the plan in order to support an argument about the workability or desirability of the plan.
8. Attacks on the adequacy of an opponent's argument: assertions that two arguments presented by the opposition are inconsistent, that a point is irrelevant or that the speaker's opponents have failed to meet a part of their proper burden.[27]

Note that items two and three are not <u>exactly</u> what is meant under the usual headings of "evidence" for debating. The "interpretation" by debaters gets away from what was actually said by the authority. If a debater has no specific evidence to support a point he wishes to make, it is probable he will be inclined to read a piece of evidence and <u>assert</u> that this "proves" his argument; it is reasonable to believe that debaters will "get away" with this tactic often enough to encourage future repetitions. Also, his opponents are probably doing similar things. Items five and six require the judge listen carefully, to avoid "granting" arguments without actually receiving "proof." Item seven is the practice of using an argument to prove itself, a fallacy of reasoning; but it seems that "even the best" debaters succeed in using this ploy. Item eight probably increases inversely with the completeness of the judge's flowchart.

Several conclusions are indicated as a result of studies in law and debate, including the following suggestions for re-analyzing academic debate practices:

1. Judges should place less emphasis upon formal validity of evidence and proportionately more upon its logical and practical validity to the specific issue under analysis.

2. All persons associated with academic debating should realize there is a point where "evidence" and "reasoning" merge, as a unification of the "proof" process. Careful attention should be given to whether the evidence offered actually supports ("proves") the reasoning used and the conclusion drawn. This "inductive leap" should be logically drawn.

3. Debaters should be encouraged to be more specific and precise in stating their evidence--exactly what was said, qualifications of the source in the discipline under consideration, significance which may properly be attributed to the statement, and applications of the evidence to the debate in progress.

4. Judges should apply proportionately more credence to "factual" evidence as opposed to "opinion." Debaters should be clear in specifying whether they are offering factual or opinion evidence.

5. More attention and self-analysis needs to be employed by judges in considering such aspects as antecedent ethos (reputation of school and debaters as affecting decisions); judge biases such as personal behavior and appearance as factors in decision-making (long hair, boisterous personalities); accepted assertions which are presented as evidence, but which presumably are irrelevant to the debate ("we stated earlier"--when "we" didn't); irrelevant factors presented as proof, such as "we're inexperienced, but we will debate our opponents anyhow" or references to earlier victories over the opposing team; and delivery, as one effect of good delivery may be to make weak evidence appear strong and vice-versa.

FOOTNOTES

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[1]William R. Dresser, "The Use of Evidence in Ten Championship Debates," Journal of the American Forensic Association 8 (September, 1964), p. 101.

[2]Wallace C. Fotheringham, "The Law of Evidence and the Debater," American Forensic Association Register 6 (1958), p. 32.

[3]Richard Bevve Gregg, "The Contemporary Applicability of the Legal Rules of Testimonial Evidence for Argument," Diss. The University of Pittsburgh, 1963, p. 116.

[4]Henry L. Ewbank and J. Jeffery Auer, Discussion and Debate (New York, 1951), p. 104.

[5]James McBurney, James O'Neill and Glen Mills, Argumentation and Debate (New York, 1964), p. 73.

[6]Dresser, p. 101; Douglas Ehninger and Wayne Brockriede, Decision By Debate (New York, 1963), p. 110; Austin J. Freeley, Argumentation and Debate (San Francisco, 1961), pp. 52-53; McBurney and Mills, p. 91; Robert B. Huber, Influencing Through Argument (New York, 1963), p. 94; Arthur N. Kruger, Modern Debate (New York, 1950), p. 132.

[7]Dresser, p. 101; Brandes, pp. 145-146; McBurney and Mills, p. 91.

[8]Dresser, p. 102; Brandes, pp. 159-161; Ehninger and Brockriede, pp. 117-120; Freeley, p. 73; Kruger, p. 133; McBurney and Mills, pp. 110, 112.

[9]Dresser, p. 102; Ehninger and Brockriede, p. 117; McBurney and Mills, pp. 104-108; Freeley, pp. 73-75; Kruger, pp. 142-143.

[10]Dresser, p. 102; Ehninger and Brockriede, p. 117; McBurney and Mills, pp. 99-100; Freeley, p. 81; Kruger, p. 141.

[11]Dresser, pp. 103-104.

[12]Ehninger and Brockriede, p. 111.

[13]Mills, p. 102.

[14]Mills, pp. 105-106.

[15]Freeley, p. 59.

[16]Fotheringham, p. 35.

[17]"Evidence," Corpus Juris Secundum 31 (Minneapolis, 1965), p. 815.

[18]Richard Davis Rieke, "Rhetorical Theory in American Legal Practice," Diss. The Ohio State University, 1964, pp. 207-208.

[19]John Henry Wigmore, The Science of Judicial Proof (Boston, 1937), p. 721.

[20]Harry Kaplan, Hans Zeisel, et. al., The American Jury (Chicago, 1968).

[21]William Bevan et. al., "Jury Behavior as a Function of the Prestige of the Foreman and the Nature of His Leadership," Journal of Public Law 7 (Fall, 1958), p. 434.

[22]Gregg, p. 116.

[23]Fotheringham, p. 22.

[24]William S. Howell, "The Role of Persuasion in Debate," American Forensic Association Register 10,(1962), p. 20.

[25]Ehninger and Brockriede, p. 110.

[26]Dresser, p. 106.